

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Domino's Pizza LLC and Local 91, United Crafts & Industrial Workers Union, Petitioner. Case 29–RC–214227

December 16, 2019

DECISION AND ORDER REMANDING

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

Pursuant to a Stipulated Election Agreement, an election was held on March 16, 2018. The tally of ballots showed 26 votes for the Petitioner and 11 against representation, with 7 challenged ballots. The Employer thereafter filed timely objections alleging, inter alia, that certain supervisors' prounion conduct constituted objectionable conduct under *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). The Regional Director directed a hearing on 28 of the objections. Following the hearing, the hearing officer recommended overruling the objections, and the Employer filed exceptions. On September 14, 2018, the Regional Director issued a Decision and Certification of Representative (pertinent portions of which are attached) overruling the Employer's objections and certifying the Petitioner as the employees' bargaining representative. Thereafter, in accordance with Section 102.69(c)(2) of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review.¹ The Petitioner filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

For the reasons stated below, the Employer's request for review is granted as it raises a substantial issue warranting review with respect to whether Supervisor Radwon Hussin's prounion conduct, including express threats of job loss, constituted coercive conduct that interfered with employees' free choice in the election. Upon review, we find that the election must be vacated and a second election directed. In all other respects, the request for review is denied.

The Employer specifically alleged in Objection 2 that, during the critical period before the election, supervisory Assistant Manager Radwon Hussin threatened employees with discharge or job loss. At the hearing, witnesses

testified that Hussin told three employees that, if the Petitioner lost the election, employees would lose their jobs, and told a fourth employee that if the Petitioner won the election, employees would not have jobs. The Hearing Officer credited the testimony that Hussin made those statements and discredited Hussin's denials of the same. The Regional Director accepted the hearing officer's credibility resolutions and factual findings, but nevertheless overruled Objection 2. As described more fully below, we conclude that the Regional Director erred in overruling Objection 2.

In *Harborside*, supra, the Board formulated a two-step inquiry to apply in cases involving objections to an election based on prounion supervisory conduct. The first step considers whether the supervisor's prounion conduct "reasonably tended to coerce" or interfere with the employees' exercise of free choice in the election, including consideration of the "nature and degree" of supervisory authority. 343 NLRB at 909. The second step considers whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election. *Id.* In setting forth this inquiry, the Board—subject to instructions from the United States Court of Appeals for the Sixth Circuit—was concerned primarily with clarifying that prounion supervisory conduct need not be accompanied by an explicit threat or promise in order to be deemed coercive under the first prong.² Consistent with prior precedent, the Board stated that some objectionable conduct may involve "the more subtle question" of whether a prounion supervisor's conduct "amounted to implicit threats or coercion." *Id.* at 909 (quoting *NLRB v. Regional Home Care Services*, 237 F.3d 62, 69 (1st Cir. 2001)). Specifically, the Board held that a prounion supervisor's solicitation of authorization-card signatures from his or her subordinates is "inherently coercive," absent mitigating circumstances. *Id.* at 906. Given the "nature and degree" of authority that some supervisors have over their subordinates, the Board reasoned, an employee may feel an "implied threat" or "pressure" to sign a card or otherwise support the union, even without an express threat or promise. *Id.* at 907, 909.³ However, as discussed more fully below, the *Harborside* decision did not purport to alter Board precedent regarding whether a supervisor's explicit threat may be coercive.

¹ The Employer requested review of the disposition of the following 20 objections, which the Regional Director grouped by type: Objection 1; Objection 2; Objections 3, 5, 13 and 39; Objections 7, 8, 10, 14, 15, 19 and 27; Objections 12 and 24; Objections 22 and 23; Objection 28; Objection 32; and Objection 36.

² To the extent that certain then-recent cases seemed to suggest otherwise and had caused "confusion," the *Harborside* Board "disavow[ed]" the language in those cases. See *id.* at 906, 909 (citing cases).

³ See also *Madison Square Garden CT, LLC*, 350 NLRB 117, 121 (2007) (where prounion supervisors had disciplinary authority, employees whom they supervised could "reasonably fear" that refusing to sign a card "would make them more vulnerable to a disciplinary write-up," even though the supervisors in that case did not expressly threaten discipline in connection with the solicitation).

In the *Harborside* case itself, the supervisor in question (a charge nurse) not only solicited authorization card signatures but also stated that employees could lose their jobs if they did not vote for the union. The Board observed that the charge nurse had authority effectively to recommend discharge, presumably in order to underscore that her subordinates could “reasonably believe” they would be discharged if they did not vote for the union. 343 NLRB at 910–911, 913.⁴ Strictly speaking, however, this observation may have been unnecessary dictum, given that the Board ordinarily finds *express* supervisory threats to be objectionable (or to constitute unfair labor practices) without requiring a showing that the supervisor possesses the specific indicium of authority that a given threat might implicate. In this regard, it is well settled that employers are responsible for the statements of supervisors as their agents and that, even from the mouth of a prounion supervisor, an express threat of antiunion retaliation is objectionable. See, e.g., *Ace Heating and Air Conditioning Co.*, 364 NLRB No. 22, slip op. at 2 (2016) (citing cases);⁵ *Waste Management, Inc.*, 330 NLRB 634 (2000) (supervisor’s threat of discharge deemed objectionable despite the employer’s argument that the supervisor did not have authority to discharge employees). *Harborside* did not purport to disturb these principles and must be read as consistent with them. Therefore, although *Harborside*’s first prong considers the “nature and degree” of supervisory authority in assessing whether card solicitation would reasonably tend to coerce employees via an *implied* threat, we do not believe the same analysis is required when assessing whether *express* threats are coercive. In fact, elsewhere in the *Harborside* opinion, the Board acknowledged that express threats of job loss are “highly coercive and one of the most serious forms of election misconduct.” 343 NLRB at 913 (citing *Waste Management*, 330 NLRB at 634 fn. [2], and *Lakehaven Nursing Home*, 325 NLRB 250, 251 (1997)). In sum, although *Harborside*’s discussion of supervisory authority in the first prong focused on the concerns in that case regarding implied threats, we clarify here that a supervisor’s express threat is coercive under the first prong, whether or not the supervisor possesses the specific authority to effectuate the threat.

⁴ See also *Millard Refrigerated Services, Inc.*, 345 NLRB 1143, 1146 (2005) (in the face of a supervisor’s express threat of discharge, the Board noted his authority to effectively recommend discharge in concluding that employees could “reasonably believe” they would be discharged).

⁵ In *Ace Heating* itself, a prounion supervisor told employees that the company’s owner said he would close the plant if they voted for the union. The Board held the employer liable for the supervisor’s threat as a supervisor and agent under Sec. 2(11) and (13) of the Act, regardless of whether the threat was specifically “authorized” by the employer, and

Turning to the case at hand, Objection 2 alleges in part that, during the critical period, Hussin told three employees that employees would lose their jobs if the Petitioner lost the election and told a fourth employee that they would not have jobs if the Petitioner won. In overruling Objection 2, the Regional Director relied primarily on the lack of evidence that Hussin had the authority to discharge employees or to recommend their discharge in finding that his statements were not coercive. The Regional Director distinguished Hussin from the supervisors in *Harborside* and *Millard Refrigerated Services*, whose authority to recommend discharge underscored (perhaps unnecessarily) the findings that their respective threats of job loss were coercive. In doing so, the Regional Director essentially assumed the reverse—that Hussin’s *lack* of authority to recommend discharge meant that employees would *not* reasonably be coerced by his predictions of job loss. But as explained above, although the assessment of a supervisor’s specific authority might be necessary to find implied coercion under the first prong of *Harborside*, it is not required for finding that an express threat is coercive. To the contrary, as discussed above, express threats of job loss are considered “highly coercive.” See, e.g., *Harborside*, 343 NLRB at 913; *Waste Management*, 330 NLRB at 634 fn.2. It follows that even if a prounion supervisor does not possess the authority to discharge employees, express statements that employees will lose their jobs based on the election result cannot be construed as anything but highly coercive attempts to induce employees to vote for the union. Accordingly, we conclude, contrary to the Regional Director, that Hussin’s express threats of job loss were coercive under the first prong of *Harborside*.

Having found that Hussin’s threats were coercive, we now consider their effect on the election’s outcome under *Harborside*’s second prong. In connection with other objections, the Regional Director found that only 3 employees were subject to Hussin’s other coercive conduct.⁶ Applying the second prong of *Harborside*, she concluded that Hussin’s conduct did not materially affect the outcome of the election because the number (3) was smaller than the

regardless of the supervisor’s motivation or prounion “sympathies.” See *id.*, slip op. at 2.

⁶ Specifically, Hussin solicited card signatures from two employees (Objection 1); expressly told a third employee (Asifuo Islam) to vote for the Petitioner (Objection 12); and remained silent when a former general manager told Islam that, if the Petitioner won the election, the Employer would eventually discharge employees (Objection 23). Islam may also have been subjected to the threats of discharge which we find to be coercive in connection with Objection 2, but for purposes of counting the total number of employees here, we obviously do not count Islam twice.

number of votes needed to shift the election result,⁷ and because the Employer's "extensive" antiunion campaign and "disavowals" of Hussin's conduct effectively mitigated any coercive effect. However, based on our conclusion that 4 additional employees were subject to coercive conduct as alleged in Objection 2, we find that a total of 7 employees were subject to his conduct—i.e., more than the 4-vote shift needed to change the outcome in this case. *Harborside*, 343 NLRB at 913. Moreover, there is no evidence that the Employer disavowed Hussin's specific threats encompassed in Objection 2 by reassuring employees they would not be discharged based on their vote in the election. See *Madison Square Garden*, 350 NLRB at 122 (insufficient mitigation where the employer did not disavow the supervisors' specific pronoun conduct including card solicitations). We therefore conclude, contrary to the Regional Director, that the totality of Hussin's conduct interfered with employees' freedom of choice to the extent that it materially affected the election's outcome and was not sufficiently mitigated by the Employer's campaign or partial disavowals.

Accordingly, we reverse the Regional Director's Decision and Certification of Representative in this case, vacate the results of the election, and remand the case to the Regional Director to conduct a second election.

Dated, Washington, D.C. December 16, 2019

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Even assuming that the Employer's supervisor engaged in objectionable pronoun conduct,¹ the majority errs in setting aside the election. That step unfairly permits the Employer to take advantage of supervisory misconduct that it condoned, contrary to Board and judicial precedent.² As the majority notes, the Employer was aware of,

but did not disavow, Supervisor Radwon Hussin's threats that employees would be discharged based on their vote in the election. The Employer engaged in an active antiunion campaign, and it had many opportunities to address Hussin's actions, yet it never did so. Accordingly, the Board should certify the Union as employees' representative.

Dated, Washington, D.C. December 16, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to Section 102.69 of the Board's Rules, I have considered the exceptions filed by Domino's Pizza LLC, herein called the Employer, to the hearing officer's report recommending disposition of objections filed to an election held on March 16, 2018.¹ The election was conducted pursuant to a Stipulated Election Agreement. The Tally of Ballots shows 26 ballots cast for Local 91, United Crafts and Industrial Workers Union (herein called the Petitioner or the Union) and eleven ballots cast against the participating labor organization with seven challenged ballots, a number insufficient to affect the results. The Employer filed timely objections to the election.

On April 4, the undersigned issued a Report on Objections and Notice of Hearing. The April 4 Report directed that a hearing be held on Objections 1, 2, 3, 5, 7, 8, 10, 12, 13, 14, 15, 19, 20, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 39 (alleging that assistant told employees to attend Union meetings via text message), and 40. The remainder of the Employer's objections were overruled in the April 4 Report. Pursuant to the April 4 Report, a hearing was held before a hearing officer on April 16 through April 20.

On June 4, the hearing officer issued a Report in which she recommended that the Employer's objections be overruled. As described more fully below, the Employer filed exceptions related to the Hearing Officer's Report and Recommendations to overrule its objections and a brief in support thereof. Thereafter, the Petitioner filed a brief in opposition.

I find that the Hearing Officer's rulings made at hearing are free from prejudicial error and are hereby affirmed. I have

consideration of the nature and degree of supervisory authority possessed by those who engage in pronoun conduct." Id. at 909.

² See *B.J. Titan Service Co.*, 296 NLRB 668, 668 (1989); *Republic Electronics*, 266 NLRB 852, 853 (1983); *NLRB v. Columbia Cable TV Co.*, 856 F.2d 636, 639 (4th Cir. 1988); *NLRB v. Manufacturer's Packaging Co.*, 645 F.2d 223, 226 (4th Cir. 1981). See also *Laguna College of Art & Design*, 362 NLRB 965, 965 fn. 3 (2015) (personal statement of Member McFerran).

¹ All dates hereinafter are 2018, unless otherwise indicated.

⁷ The Regional Director inadvertently stated that an 8-vote shift was needed to change the election result. Assuming that all 7 challenged ballots were cast against representation, the Petitioner's margin of victory would be 8 votes, and only a 4-vote shift would change the result.

¹ Because I would not set aside the election here in any case, I do not address the majority's debatable interpretation of *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), with respect to whether a pronoun supervisor's explicit threat can be coercive even if the supervisor lacks authority to carry out the threat. *Harborside* is explicit that in evaluating supervisory pronoun conduct, the Board's "inquiry includes ...

reviewed and considered the evidence and the arguments presented by the parties and, as discussed herein, I agree with the Hearing Officer that the Employer's objections should be overruled. Accordingly, I am issuing a Certification of Representative.

II. WHETHER THE PRO-UNION CONDUCT OF ASSISTANT MANAGERS RADWON AND SAMAD WARRANTS SETTING ASIDE THE ELECTION

As noted above, the Employer takes exception to the hearing officer's finding that the conduct of Assistant Managers Radwon and Samad was not objectionable.

Background

The facility at issue (the Howard Beach Store or Store 3597), opened about 3 years before the instant hearing. Bablu Rahman (Bablu), was the first general manager of the Howard Beach store. Bablu was terminated by the Employer about the last week of December 2017. The Howard Beach store did not have a general manager from the last week of December 2017 until January 8. On about January 8, Corina Cojocararu became the general manager of the Howard Beach store.

The petition in the instant case was filed on February 2, 2018.

On about February 19, Nadia Rahman replaced Cojocararu as General Manager.

An election by secret ballot was conducted on March 16 among employees in the stipulated unit.¹⁹

Assistant Manager Role/Duties and Prounion Conduct

Assistant Manager Role/Duties

Each Domino's store operates with one general manager and three to five assistant managers. With regard to the Howard Beach store, the evidence shows that during the critical period there were five assistant managers, i.e., Radwon, Samad, Danielle Gravesand, Vijai Vissesar and Mohammed Islam.²⁰ The general manager works 52 hours a week; assistant managers work shifts throughout the day; shifts run from about 8 a.m. to 2 or 3 a.m. Thus, in general, there are many hours that the store operates without a general manager present.²¹

Assistant managers "maintain the business of the store." This includes tasks such as dispatching deliveries to the delivery experts, herein also called drivers, assigning tasks to team members, keeping the store clean, taking phone calls, dealing with customer complaints, and inspecting and evaluating the store. They also help out when necessary making pizzas, cleaning and working the cash registers. Further, assistant managers in general may have involvement in interviewing job applicants, assigning shifts, offering employees overtime²² and they may issue

verbal warnings for not being in uniform or for being late.²³ They approve employee discounts, promotional discounts and the reimbursement of expenses for additional mileage to drivers for non-pizza deliveries or for having to make a return trip for the same delivery, and they are subject to being evaluated by a Domino's inspector in an Operations Evaluation Report if they are the manager in charge of the store at the time of an inspection.

Assistant Managers' Prounion Conduct

The hearing officer credited testimony showing the following assistant manager prounion conduct²⁴

Solicitation of Union Authorization Cards by Assistant Manager Radwon (Objection 1)

The hearing officer credited evidence that in about December 2017 and January 2018, Assistant Manager Radwon spoke to drivers Forhad Hussain and Shaek Farid, respectively, about signing cards for the Union.

More specifically, in December 2017, during a phone conversation, Radwon told Hussain that the Union was coming. Radwon spoke about signing some papers. Hussain told Radwon that he was not sure; he had to make up his mind and he would let him know another time. Thereafter, on an unspecified date, Radwon tried to give driver Hussain a paper from the Union, but Hussain refused to take it.

Further, in January 2018, Radwon told driver Farid that if he wanted a card, he would bring it to him and he could sign it.²⁵ Radwon told Farid that the other employees from Sylhet, Bangladesh already signed cards and that he was the only employee from Sylhet that had not signed. The evidence does not show whether Radwon spoke to Farid again about signing or whether he actually brought Farid a card.

The hearing officer also credited evidence that during the critical period, in February, Radwon told employees that 30 employees signed cards.

Threats of Discharge by Assistant Manager Radwon (Objection 2)

Driver Asifuo Islam testified that he had conversations with Assistant Manager Radwon when he was driving him home after work after their shift. On an unspecified date, Assistant Manager Radwon told Islam that if the Union did not win, people would get fired. The record contained no further details about this conversation. There is no evidence that Islam told other employees about Radwon's statement.

On February 25 or 26, Assistant Manager Radwon told driver Delwar Hossen and two other drivers, Nezid Ulhassan and Shaid Palit, that if the Union lost the election, Radwon and other

¹⁹ The election was initially scheduled for March 2 but was rescheduled due to weather.

²⁰ Islam transferred to the Howard Beach store on February 12.

²¹ The record indicates that during the critical period there was an increased presence of higher management at the store as discussed below in connection with the Employer's campaign.

²² The evidence shows assistant managers do not have the authority to require an employee to work overtime.

²³ With regard to verbal warnings, if an employee is out of uniform or over fifteen minutes late, an assistant manager has some discretion on

whether to issue a verbal warning, which is recorded on the Employer's computer. However, the record does not establish that such discipline lays the foundation for further personnel action.

²⁴ The conduct engaged in is encompassed by the objection number(s) noted.

²⁵ Farid testified that he had two conversations with Radwon about the Union; the evidence shows that this solicitation took place during the second conversation.

employees would lose their jobs, but if the Union won the election, Hossen would need his permission to work in the store.

About 2 weeks before the election,²⁶ Radwon told driver Mohin Uddin that employees would not have jobs if the Union won.

Attended Union Meetings and Encouraged Attendance at Union Meetings (Objections 3, 5, 13 and 39)

In late February and early March, Assistant Manager Radwon attended at least two Union meetings.²⁷ Additionally, Radwon also spoke to or texted employees about attending union meetings. Radwon told driver Asifuo Islam to attend a meeting but Islam never went to the meeting.

Promised Benefits (Objections 7, 8, 10, 14, 15, 19 and 27)

The hearing officer credited multiple witnesses that before and during the critical period, Radwon told employees they would get better benefits, including higher wages, vacation and medical benefits, job security and assistance finding other work if the Union won the election. Assistant Manager Radwon told driver Farid that the Union could get him a job if he did not want to work for Domino's any longer.

More specifically, on February 25 or 26, Radwon told three drivers, Hossen, Ulhassan and Palit, that the Union would give them a starting rate of \$18.50 per hour, medical benefits, vacation benefits, and a job guarantee. In January or February, Radwon told driver Farid that if the Union came in, employees' wages would go up to \$18 per hour and they would get additional benefits, including medical benefits and job security.²⁸ Radwon also told Farid that he would be able to work whenever he wanted and that the Union could help employees obtain jobs outside of Domino's if they wished. Three other drivers testified about similar promises by Radwon.

Told Employees to Vote for the Union (Objections 12 and 24)

On an unspecified date, Assistant Manager Radwon told driver Asifuo Islam that he should vote for the Union.

Assistant Manager Radwon Called a Former General Manager to Speak to an Employee About the Union (Objections 22 and 23)

One night prior to the initially scheduled date for the election (March 2), driver Asifuo Islam asked Radwon about the Union when he was driving Radwon home. At that point, Radwon called former general manager Bablu Rahman (herein Bablu), who was "close" with Islam, on speakerphone. Bablu told Islam that if Domino's won the election, they would send some drivers to another store and they could be subject to discipline, including termination. Bablu told Islam that "You are my people so . . . you should understand" about voting for the Union. Islam testified that he did not ask any other questions. The evidence does not indicate any participation by Radwon in this conversation.

Sought to Undermine the Employer's Position on the Union

²⁶ Uddin indicated that this statement was made by Radwon before the March 2 election was cancelled.

²⁷ No employee testified about seeing Radwon at a Union meeting. Nor is there any evidence of his conduct at the meetings.

²⁸ This was not the same day Radwon asked Farid if he wanted

(Objection 28):

On February 8, the Employer's Program Leader/Market Trainer, Ashrahfuz Mutlib was visiting in the store late night with Manager of Corporate Operations MD Islam. Assistant Manager Radwon approached Trainer Mutlib; Assistant Manager Samad was with Radwon. About six or seven employees were present in the store at the time. Radwon told trainer Mutlib that the Employer could have meetings about the Union, but that employees would listen to him. Mutlib asked if there was anything he could do to stop the Union activity and Radwon told him that the Employer could not stop the activity. Mutlib testified that the Employer was holding its campaign meetings prior to this incident and that employees would have known the Employer wanted them to vote against the Union.

When Mutlib posted the Notices of Election in front of eight or nine employees, Radwon said that employees should vote "yes" for the company and "no" for the Union. Mutlib immediately corrected Radwon in front of the employees.

After a "ride along,"²⁹ General Manager Nadia Rahman was in a car discussing the Union with two drivers. General Manager Rahman told the employees that they should not support the Union because someone else told them to do so. Radwon then joined the group. Radwon told General Manager Rahman that she should not discuss the Union or any "pro-company thing" with employees. General Manager Rahman told Radwon that she would continue to talk the employees.

The Hearing Officer noted that after each of these three incidents, the Employer's higher managers immediately disavowed Radwon's statements in the presence of employees.

Allegation That Assistant Managers Showed Favor to Certain Employees in Assignments (Objection 32)

Objection 32 alleges that the Employer's supervisor(s) gave more favorable assignments to employees who expressed their support for the Union and gave unfavorable assignments to employees who did not express support for the Union. The hearing officer credited as truthful driver Hossen's testimony that Assistant Manager Radwon sometimes "showed favors" to four drivers and that two of these drivers were Union supporters. Hossen's testimony did not provide specific testimony about what "favors" were shown to these employees. The credited testimony of both Assistant Manager Vissesar and General Manager Nadia Rahman shows that certain employees complained that deliveries were being dispatched in an unfair manner, that there were claims that Union supporters were favored. Further the Hearing Officer credited Assistant Manager Vissesar's testimony that Assistant Manager Radwon allowed more experienced drivers to make deliveries within the last thirty minutes of their shift; that he asked Radwon why he made such assignments and Radwon responded that they were quick drivers and they would be back before the end of their shift. The record does not indicate any examples where these drivers returned after the end

Radwon to bring him a card.

²⁹ On a ride-a-long, management would accompany a driver on a delivery. Ride-a-longs were part of the Employer's campaign to advise employees of its stance that they did not need a Union, as discussed below.

of their shifts requiring premium pay.

The Employer's Campaign

The credited evidence shows that after the petition was filed on February 2, the Employer engaged in a substantial campaign to advise employees of its opinion that the Union was not necessary in its operations. The Employer advised the general manager that she could not force employees to vote for the company and provided guidelines on how to express the Employer's opinion on the Union. Assistant managers were advised that they were supervisors and agents of the company, that they could not assist the Union and that they could not express an opinion that was favorable to the Union because they were not allowed to work against the company.³⁰ The Employer's campaign directed at unit employees included mandatory meetings with employees off premises one or two times per week, posting at least ten notices in the store and going on "ride alongs" with drivers every night. There was an increased management presence at the store during the critical period for campaign purposes.

More specifically, the Employer held one or two meetings per week off-premises between February 5 and March 16 to let the employees know its position on the Union. All employees who were on the clock at the time of the meetings were required to attend.³¹ On February 7, Director of Corporate Operations Robert Machim³² ran a mandatory meeting at a hotel. Machim told employees that the Employer did not need a third party to communicate with its employees; that a third party was not necessary in its business. The record shows employees were also shown movies or picture projections on a screen at meetings. Employee testimony indicates that each meeting lasted one or two hours. The record indicates estimates of at least 20 employees at each meeting.³³

With regard to ride-alongs, the evidence shows that during the critical period, five members of management, including Director of Corporate Operations Machim, General Manager Rahman, Manager of Corporate Operations Islam³⁴ and Lead Manager of Corporate Operations Aurora Albright,³⁵ conducted ride alongs, where the manager accompanied a driver on a delivery and talked with the driver. These ride alongs were conducted almost every night. The number of drivers who were accompanied by managers varied from two to twelve per night. According to employee testimony, during various ride alongs, managers explained that Domino's already gave employees certain benefits; that the Union's chief executive officer went to jail; that

employees did not need a Union; that they should make up their own minds and "you shouldn't just go for it because somebody tells you."

With regard to the Employer's postings, the evidence shows that there were at least ten postings related to the Union during the Employer's campaign. These postings notified employees of the Employer's position that the Union was not needed in the Employer's operations.

The evidence also shows that during the critical period, General Manager Rahman spoke to employees about the Union almost every other day inasmuch as they approached her on the subject. Further, the evidence shows that General Manager Rahman and Program Leader/Market Trainer Mutlib spoke to employees individually or in groups of two at a nearby Dunkin Donuts.

Employee testimony shows that employees were aware that the Employer did not want employees to vote for the Union. Management testimony also shows that employees present for certain conversations between the Employer and Assistant Manager Radwon would know Radwon and management had a different position on the Union situation.

Discussion

Board Law

The legal standard to be applied in cases involving objections to an election based on supervisory prounion conduct, stated by the Board in *Harborside Healthcare Inc.*, 343 NLRB 906 (2004) is as follows:

When asking whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election, the Board looks to two factors.

(1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.

This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

(2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the

³⁰ On February 15, the Employer met with the five assistant managers who worked at the Howard Beach store. The meeting took place in a small training room at another store. Further, Assistant Managers Samad Hussan and Radwon Hussin signed a document entitled, "Domino's Pizza, LLC, Basic Guidelines For Lawful Communications Regarding Unions: "FOE" and "TIPS." This document advised the assistant managers that they could share facts, opinions and experiences regarding the Union, but could not threaten, interrogate promise or surveil employees. Facts cited in this document included that unions only represent 6.4% of all employees, that unions can charge employees for dues, initiation fees, fines, assessments and other hidden charges, and that paying union dues does not protect employees' jobs when business declines. Opinions cited in the document include that flexibility and teamwork were keys to Domino's success, that during contract negotiations, a union could push for work rules and other changes that could hurt individual employees, that

"we just don't need a union here," that the Employer cared about employees and believed in working with each other not fighting with each other. The Hearing Officer's Report cited further examples of management's instructions as to what assistant managers could tell employees and requests to tell employees that the Union was not good.

³¹ Employees were paid for the time they attended the meetings. The Employer assigned managers and supervisors to fill in at the store while employees attended the meetings.

³² Machim is in charge of running several corporately owned stores.

³³ Other estimates placed about 30, 35, 40 and 50 employees present.

³⁴ The first name of the Manager of Corporate Operations is reported on the record as "Indy" and "MD."

³⁵ Albright testified that she directly supervised five Managers of Corporate Operations.

conduct became known; and (e) the lingering effect of the conduct.

Further, under the first prong of the *Harborside* standard, in examining the nature, extent and context of the supervisor's conduct, the Board held that with respect to the solicitation of authorization cards, absent mitigating circumstances, such solicitations have an inherent tendency to interfere with the employees' freedom of choice to sign a card or not and thus may be objectionable. *Id.* at 910.

Application of Board Law to Facts

As discussed more fully below, I find that Radwon's conduct in connection with soliciting two employees to sign Union authorization cards, telling an employee he should vote for the Union and remaining silent when a former general manager told an employee his view of what would happen if Domino's won the election could reasonably tend to coerce or interfere with employee free choice, in the absence of mitigating circumstances. However, I further find that Radwon's conduct did not interfere with employees' exercise of free choice to the extent that it materially affected the outcome of the election under the applicable *Harborside* standard.³⁶

- (1) Whether Radwon's conduct reasonably tended to coerce or interfere with employee free choice³⁷

a. The nature and degree of Radwon's supervisory authority

As set forth above, I have found that the Petitioner is bound to the Stipulated Election Agreement wherein it agreed that the assistant managers at the Howard Beach store were supervisors within the meaning of the Act.

The record shows that the assistant managers are relatively low level supervisors within the company. They are subordinate to the general manager in the store, and there are further layers of corporate managers, including the manager of corporate operations, the lead manager of corporate operations and the director of corporate operations.

While the assistant managers have authority in performing the tasks required to maintain the business of the store, the credited evidence shows that their authority is limited. Assistant managers are expected to follow set company policies in most aspects of maintaining the business of the store and they are monitored by higher management in setting forth the Employer's policies and procedures. In this regard, the record indicates that assistant managers may use some discretion in offering overtime and assigning deliveries, i.e., assigning two orders to one driver if there were an insufficient number of drivers or assigning certain

drivers a delivery less than 30 minutes prior to the end of their shift.³⁸ However, the unit employees are aware of the limits to the authority of the assistant managers. Indeed, the evidence shows that employees made complaints to higher managers, including the general manager, about the assistant managers' dispatch of deliveries in conflict with the Employer's set procedures.³⁹ And, an assistant manager cannot require an employee to work overtime. Further, while assistant managers have the authority to verbally warn employees regarding lateness and not being in uniform, there is no record evidence that such verbal warnings lay the foundation for further discipline and there is no evidence that assistant managers possess the authority to discharge or recommend the discharge of other employees.

However, assistant managers are the immediate supervisors of the unit employees. Further, they are the only supervisor in the store and the manager in charge of the store for hours at a time every day during the work week. Thus, I do not ignore that as such, they can impact unit employees' work lives on a daily basis. See, e.g., *Madison Square Garden, Ct. LLC.*, 350 NLRB 117 (2007); *SNE Enterprises, Inc.*, 348 NLRB 1041 (2006).

b. Nature, extent and context of Radwon's prounion conduct

Radwon's conduct included soliciting two employees to sign Union authorization cards, telling employees they could lose their jobs if the Union lost the election, attending two Union meetings, telling an employee to attend a Union meeting, informing employees about Union meetings, telling an employee he should vote for the Union, attempting to interfere with the Employer's message against Union representation and remaining silent when a former general manager told an employee his view of what would happen if the Employer won the election. Radwon's conduct was directed at employees who were under his continuing direct supervision.

(i) The solicitation of cards (Objection 1)

In connection with Objection 1, the credible evidence shows that Radwon talked to employees about signing cards; he told employees that 30 employees had signed cards. Further, before the critical period, Radwon solicited drivers Hussain and Farid to sign cards; these two employees worked with Radwon on the same shift. The fact that Radwon told driver Farid that Farid was the only employee from Sylhet, Bangladesh that did not sign a card would give Farid reason to believe that Radwon would know whether he ultimately signed a card. While the evidence does not show that these employees actually took a card from Radwon, their subjective reaction to Radwon's conduct is not considered in determining whether his conduct reasonably

³⁶ The hearing officer overruled Objections 20, 26, 29, 30, 31, 33, and 34 inasmuch as no evidence was offered in support of said objections. The Employer takes exception to the Hearing Officer's recommendation to overrule Objections 20, 26, 29, 30, 31, 33, and 34 but does not provide support. Accordingly, I overrule Objections 20, 26, 29, 30, 31, 33, and 34.

³⁷ The Hearing Officer found there was no credible evidence that Assistant Manager Samad engaged in the conduct alleged to be objectionable. After careful review of the record, I find no basis for reversing the hearing officer's credibility determinations.

³⁸ The hearing officer credited Assistant Manager Vissesar's testimony that Assistant Manager Radwon allowed more experienced drivers

to make deliveries within the last 30 minutes of their shift; that he asked Radwon why he made such assignments and Radwon responded that they were quick drivers and they would be back before the end of their shift. The record does not indicate any examples where these drivers returned after the end of their shifts requiring premium pay. Also, the hearing officer noted many witnesses reported that the more senior employees were getting better delivery assignments.

³⁹ Employee complaints also alleged that assistant managers were making more favorable delivery assignments to certain drivers who supported the Union and less favorable assignments to drivers who did not support the Union.

tended to coerce or interfere with the employees' exercise of free choice. Inasmuch as Radwon directly solicited two employees who were under his immediate supervision, such conduct has an inherent tendency to interfere with these employees' freedom to choose to sign a card or not and thus may be objectionable in the absence of mitigating circumstances. See *Harborside Healthcare*, supra. And, while the solicitation of the two employees took place outside of the critical period, it is noted that the Board in *Harborside Healthcare* found that while the solicitation of cards may be conduct outside the critical period, such would not necessarily mean that the conduct is not objectionable inasmuch as a supervisor's solicitation would ordinarily continue to be felt during the critical period.

The second prong of the *Harborside* standard, i.e., whether this conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, will be addressed below.

(ii) Assistant Manager Radwon's Call to a Former General Manager to Speak to an Employee About the Union (Objections 22 and 23) and Telling an Employee to Vote for the Union (Objections 12 and 24)

In connection with the conduct encompassed by Objections 22 and 23, as noted above, the credited evidence shows that during the critical period, driver Asifuo Islam asked Radwon about the Union when he was driving Radwon home. Radwon initiated a call to former general manager Bablu, who was "close" with Islam, on speakerphone. Bablu told Islam that if Domino's won the election, they would send some drivers to another store and they could be subject to discipline, including termination. Bablu told Islam that "You are my people so...you should understand" about voting for the Union. Islam testified that he did not ask any other questions. The evidence does not indicate any participation by Radwon in this conversation.

I find that employees would not reasonably believe that this former general manager reflected company policy and was speaking on behalf of the Employer.⁴⁰ In this regard, Bablu was not employed by the Employer at the time Radwon called Bablu, who both men apparently had a relationship with outside of work, for his input.

However, I acknowledge, as the Employer points out, that Assistant Manager Radwon, a current supervisor, initiated the call to Bablu, was present during the speakerphone conversation, and that there is no evidence that he disavowed Bablu's statements.⁴¹ Whether Radwon's silence on these matters would likely be interpreted as the Employer condoning Bablu's statements is discussed in the section below related to mitigating factors involved. Thus, I find Radwon's conduct in staying silent when Bablu told a driver that if the Employer won, they would send some drivers to another store where they would be subject to discipline, would reasonably tend to interfere with employee free choice in the absence of mitigating circumstances.

⁴⁰ The record shows Bablu was discharged by the Employer. Driver Islam testified that he was "close" with Bablu.

⁴¹ The Employer excepts to the hearing officer's finding that Bablu's comments were unobjectionable third-party comments that did not create an atmosphere of fear and reprisal that would render a free election impossible under *Westwood Horizons Hotel*, 270 NLRB 802 (1982). The

The second prong of the *Harborside* standard, i.e., whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, will be addressed below.

In connection with conduct encompassed by Objections 12 and 24, the hearing officer credited evidence that on an unspecified date, Assistant Manager Radwon told driver Asifuo Islam that he should vote for the Union. Further details of the conversation were not provided. There is no evidence that the statement was accompanied by a threat or promise. However, in the absence of the Employer taking a stance to the contrary, such a statement by a supervisor could imply that the Employer wanted employees to vote for Union. Thus, this statement by Radwon would reasonably tend to interfere with employee free choice in the absence of mitigating circumstances.⁴²

(iii) Threats of Job Loss, Attendance at Union Meetings, Promises of Benefits

In connection with threats encompassed by Objection No. 2, the credible evidence shows that assistant manager Radwon told one employee that people would get fired if the Union lost the election. The evidence does not establish that Radwon's statement was disseminated. However, Radwon made statements about job loss to another four employees. In this regard, during one conversation, he told three drivers that employees⁴³ would not have jobs if the Union lost; he told one of these employees that that the employee would need his permission to work if the Union won. Radwon also told another employee that employees would not have jobs if the Union won. A prounion supervisor's threats of job loss if the Union loses the election may be coercive. See e.g., *Harborside Healthcare, Inc.*, supra (where prounion supervisor who had the ability to retaliate against employees repeatedly threatened several employees with the prospect of job loss if the union lost the election, such conduct was found coercive); *Millard Refrigerated Services, Inc.*, 345 NLRB 1143 (2005) (where a prounion supervisor had the authority to effectively recommend the discharge of employees, his repeated or similar threats to his crew that, "[I]f the union does not get in, everybody will probably be fired," was found coercive). While the record shows that assistant managers have the authority to verbally warn employees regarding lateness and not being in uniform, there is no record evidence that such verbal warnings lay the foundation for further discipline. Further, there is no contention or evidence that assistant managers possess the authority to discharge or effectively recommend the discharge of other employees. Thus, employees in these circumstances would not reasonably be coerced by Radwon's statements. Compare *Millard Refrigerated Services, Inc.*, supra. I note that the record does not establish that the two employees who Radwon asked to sign cards were subjected to these threats. Further, I agree with the hearing officer that Radwon's remark to one employee that if the Union won, he would need Radwon's permission to work is not the type

Employer asserts that because Radwon did not refute or disavow Bablu's comments, he tacitly acknowledged their validity.

⁴² The second prong of the *Harborside* standard, i.e., whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, will be addressed below.

⁴³ He included himself in this group.

of conduct which would reasonably interfere with or coerce an employee to vote for the Union. Accordingly, Objection No. 2 is overruled.

In connection with conduct encompassed by Objections 3, 5, 13, and 39, the credited evidence shows that Radwon attended at least two Union meetings and spoke or texted employees about attending Union meetings. The hearing officer also found that Radwon encouraged one employee to go to a Union meeting. A prounion supervisor's attendance at a union meeting, standing alone, does not establish coercion or interference under *Harborside's* first prong. See, e.g., *Northeast Iowa Telephone Company*, 346 NLRB 465 (2006) (where the Board found no coercion or interference even though managers attended union meetings, participated in discussions at those meetings, signed authorization cards in front of employees and mentioned some of the issues that a union could help resolve, such as the fairness of scheduling, overtime and layoffs). See also *Stevenson Equipment Co.*, 174 NLRB 865, 866 (1969) (where supervisors told employees about union meetings, attended union meetings and the supervisors and employees signed cards at the meetings, such conduct was not found objectionable). There is no evidence that Radwon spoke about the Union or solicited cards at the meetings. Further, the credited evidence does not establish that Radwon required employees to attend Union meetings. Thus, I find Radwon's attendance at two Union meetings, texting employees about one Union meeting and encouraging an employee to attend a Union meeting would not reasonably interfere with or coerce employees in their free choice. See e.g., *Northeast Iowa Telephone Company*, *supra*. In light of the foregoing, Objections 3, 5, 13 and 39 are overruled.

In connection with conduct encompassed by Objections 7, 8, 10, 14, 15, 19 and 27, the hearing officer credited multiple witnesses that Radwon told employees they would get better benefits, including higher wages, vacation and medical benefits, job security and assistance finding other work if the Union won the election. Further, assistant manager Radwon told driver Farid that the Union could get him a job if he if did not want to work for Domino's any longer. The evidence does not establish that the statements mentioning job security as a benefit of unionization would reasonably be construed as a threat of loss of continued employment if the employee does not vote for the Union.⁴⁴ The Board has found that statements by a prounion supervisor advising employees of potential benefits of collective bargaining do not reasonably interfere with or coerce employees' freedom of choice in an election. See e.g. *SNE Enterprises, Inc.*, 348 NLRB 1041 (2006) (where a first-line prounion supervisor who solicited employees to sign authorization cards also told employees that the union would help them get better benefits and treatment from the employer, the Board found such conduct was not objectionable). See also, *North East Iowa Telephone Company*, *supra*. Accordingly, I do not find that Radwon's conduct related to the promises of potential benefits of unionization would

reasonably coerce or interfere with employee free choice and Objections 7, 8, 10, 14, 15, 19 and 27 are overruled.

(iv) Other Conduct-Objection Nos. 28, 32 and 36

In connection with the conduct encompassed by Objection No. 28, alleging that the Employer's supervisors undermined the Employer's position on the Union, the credited evidence shows there were three separate incidents involving higher members of management and Radwon in connection with the Union after the petition was filed on February 2. First, on February 8, the Employer's program leader/market trainer, Ashrafuz Mutlib, was in the store late night with the Employer's manager of corporate operations, MD Islam, when about six or seven employees were present in the store. Radwon told trainer Mutlib that the Employer could have meetings about the Union, but that employees would listen to him. Mutlib asked if there was anything he could do to stop the Union activity and Radwon told him no.⁴⁵ As pointed out by the hearing officer, the evidence does not clearly establish that the employees heard the conversation.

The second incident occurred before the originally scheduled election date (March 2). When Mutlib posted the Notices of Election in front of eight or nine employees, Radwon said that employees should vote "yes" for the company and "no" for the Union. Mutlib immediately corrected Radwon in front of the employees.

The third incident occurred after a ride-along when General Manager Rahman was in a car discussing the Union with two drivers. The general manager was telling the employees that they should not support the Union because someone else told them to do so. Radwon joined them and told General Manager Rahman that she should not discuss the Union or any "pro-company thing" with employees. General Manager Rahman told Radwon that she would continue to talk the employees.

As noted by the hearing officer, after each of these three incidents, the Employer's higher managers immediately disavowed Radwon's statements in the presence of employees. Thus, I find that these three incidents do not establish that Radwon's conduct interfered with the employees' free choice by eroding the Employer's position as alleged.⁴⁶ Accordingly Objection No. 28 is overruled.

Turning to Objection No. 32, the Employer alleges that its supervisor(s) gave more favorable assignments to employees who expressed their support for the Union and gave unfavorable assignments to employees who did not express support for the Union.

The gravamen of an allegation that an employer's supervisors discriminated against employees in assigning favorable/unfavorable work assignments based on the employees' support or lack of support for the Union would require a finding that the supervisors' conduct constituted violations of Section 8(a)(3) of the Act, and such allegations must be decided in an unfair labor practice proceeding. See, *Texas Meat Packers, Inc.*, 130 NLRB 279 (1961). Indeed, the case cited by the Employer in its brief in

⁴⁴ As noted above, there is no evidence that Radwon has the ability to discharge or effectively recommend the discharge of employees. Nor does the credited evidence establish that Radwon's supervisory authority included the ability to increase employees' hourly wage rate, or provide vacation or medical benefits.

⁴⁵ Mutlib testified that the Employer was holding its campaign meetings prior to this incident and that employees would have known the Employer wanted them to vote against the Union.

⁴⁶ I will discuss the higher managers' disavowals further below when considering the second prong of the *Harborside* analysis.

connection with the conduct encompassed by Objection 32, *Trailmobile Trailer, LLC*⁴⁷ involved an election being set aside based upon post-petition unfair labor practice conduct, including the transfer of employees to more onerous positions because of their union activity. Where, as in the instant case, the conduct alleged to have interfered with the election can only be held to be such interference upon an initial finding that an unfair labor practice has been committed, it is the Board's policy not to inquire into such matters in the guise of considering objections to an election. Here, the Employer alleges that its supervisors engaged in discriminatory conduct by favoring Union supporters. However, there are no pending charges related to such conduct.⁴⁸ In the absence of a charge alleging that the Employer, by its supervisors, assigned more favorable assignments based on support for the Union in violation of the Act, the Board will presume the assignments to be lawful. *Texas Meat Packers, Inc.*, *supra*. Therefore, I find no merit to Objection No. 32 and overrule this objection.

Finally, turning to Objection No. 36, the Employer takes exception to the hearing officer's recommendation to overrule Objection No. 36, alleging that the Union, through its agents and representatives acting on its behalf or with its implied endorsement, campaigned in such a way to inflame racial and/or ethnic prejudice of employees, deliberately seeking to overemphasize or exacerbate racial and/or ethnic feelings by irrelevant, inflammatory appeals.

The hearing officer found the Employer did not present evidence on this objection. The Employer points to the testimony of driver Shaek Farid as evidence that supports this objection. In this regard, the hearing officer credited the testimony of driver Farid that when Radwon solicited a card from him in January, he told Farid that the other employees from Sylhet, a city in Bangladesh, had already signed cards.⁴⁹ The record does not specifically establish that Radwon told Farid that he and other employees from the same region in Bangladesh "needed to stick together in support of the Union."

The Board has held that it would set aside elections when a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals. *Sewell Manufacturing Co.*, 138 NLRB 66 (1962). In *Sewell*, the Board found a sustained course of conduct, deliberate and calculated in intensity, to appeal to racial prejudice. Assuming that the *Sewell* standard applies to Radwon's conduct, the single conversation in this case was not inflammatory in character, setting race against race, or appealing to animosity rather than to consideration of economic and social conditions and circumstances and of possible actions in response to them. Record evidence does not establish that the campaign was calculated to inflame racial

hatred or engender conflict between employees of different ethnic backgrounds. I find that in the circumstances of this case, Radwon's single statement, about 3 months before the election did not rise to the level of a sustained appeal to racial prejudice of the type condemned in *Sewell* and its progeny. Therefore, Objection No. 38 is overruled. See e.g., *Lichtenberg & Co.*, 296 NLRB 1302 (1989) (where appeals, among other things, to employees to stick together were not found objectionable).

In light of the foregoing analysis, I find that there is sufficient evidence to meet the first prong of *Harborside* on certain conduct, i.e., that Radwon, by soliciting authorization cards from his direct subordinates, telling an employee that he should vote for the Union and his conduct in connection with a speakerphone conversation with a former general manager, engaged in conduct that reasonably tended to coerce or to interfere with employee free choice.

(2) Whether Radwon's conduct materially affected the election outcome

As set forth above, I have found that Radwon's pronoun conduct in connection with soliciting authorization cards from his direct subordinates, telling an employee that he should vote for the Union and the speakerphone conversation with former General Manager Bablu satisfied the first prong of the *Harborside* analysis. However, I find that there is insufficient evidence to establish that Radwon's conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election. In analyzing *Harborside*'s second prong, I consider: (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

With regard to the margin of the election, the tally of ballots in the election shows 26 ballots were cast for the Union and eleven ballots were cast against the Union, and there were seven challenged ballots. Viewing the record evidence in the light most favorable to the objecting party, I will assume that the seven challenged ballots were cast against the Union, thus bringing the Union's margin of victory to eight. Thus, a shift of at least eight votes would be necessary to change the election results. The Employer has not shown that Radwon's conduct affected eight or more voters. Rather, viewing the record in the light most favorable to the Employer, three employees, Forhad Hussain, Sheak Farid, and Asifuo Islam⁵⁰ were affected by Radwon's pronoun conduct, not a critical number of employees relative to the Union's margin of victory.

With regard to whether the conduct at issue was widespread or isolated, the credited record evidence does not establish that

⁴⁷ 343 NLRB 95, 98 (2004).

⁴⁸ For example, an employee can file an unfair labor practice charge alleging favoritism by an employer in its assignments based on support or lack of support for a union. However, it is noted that an employer is not necessarily responsible for the unlawful conduct of a supervisor unless employees have reason to believe that the supervisor is acting for and on behalf of the employer.

⁴⁹ At the time, Farid was a new employee in the Howard Beach store, as he recently transferred from another store. I note that Radwon's solicitation of two employees to sign Union authorization cards is being

considered in connection with the Employer's objections that Radwon, as a supervisor and agent of the Employer, engaged in objectionable pronoun conduct. This objection alleges that Radwon was acting on behalf of the Union when he made the statement at issue.

⁵⁰ The credited evidence shows Radwon solicited Union authorization cards from Hussain and Farid. Islam was in the car with Radwon when Radwon initiated the conversation with Bablu, Radwon also told Islam he should vote for the Union. The credited evidence does not establish that any of these three employees told any other employee about Radwon's aforementioned conduct.

Radwon's card solicitations were widespread. The conversation with Bablu was an isolated incident. The credited evidence shows one incident of Radwon telling an employee he should vote for the Union.

With regard to the timing of the conduct, I recognize that with regard to the solicitation of cards, the Board has held that the mere passage of three months between card solicitations and the election does not mitigate the inherent coercion involved. *SNE Enterprises, Inc.*, 348 NLRB 1041 (2006). Thus, the timing is not a mitigating factor here.

With regard to the extent to which the conduct at issue became known, while Radwon's prounion conduct in general was well known, the credited evidence does not show that knowledge of his solicitation of cards was widespread. Further, the credited evidence does not show other supervisors solicited employees to sign cards. Further the conversation with former General Manager Bablu and the conversation wherein Radwon made the statement on how an employee should vote were directed towards one employee, and the record does not indicate that the content of the conversations were disseminated.

With regard to whether Radwon's solicitation of cards would have a lingering effect, the evidence does not establish that either of the two employees who Radwon solicited actually accepted a card from Radwon. It is noted that while the subjective reaction of employees to the prounion conduct is not considered in determining whether the conduct would reasonably tend to interfere with freedom of choice in the election, here it is relevant to whether the conduct materially affected the outcome of the election. In this regard, one employee refused the card that was offered and the testimony of the other employee indicated only that Radwon asked if the employee if he wanted him to bring him a card. In circumstances where an employee does not take a card that is offered, the concerns that there is a false portrait of employee support for the Union or that the employee would feel obligated to carry through on their stated intention to support the Union do not exist. Accordingly, the instant case is distinguishable from cases where supervisors solicited cards/signatures on a petition and employees, reasonably being concerned that the "right" response will be viewed with favor, and a "wrong" response with disfavor, respond by taking the card and/or signing the petition. Accordingly, I find that the circumstances herein do not warrant a finding that there is a lingering effect associated with Radwon's solicitation of cards.

Finally, with regard to the Employer's antiunion stance, as set forth more fully above, the credited record evidence shows that the Employer engaged in an extensive campaign to advise employees of its stance against the Union. Indeed, high level managers conducted one or two mandatory meetings a week during the critical period, i.e., from six to twelve meetings. Director of Corporate Operations Machim led meetings and told the employees that they did not need the Union. The meetings lasted one to two hours. Credited employee testimony indicates high employee attendance at the Employer's meetings. Indeed, the Employer admits managers filled in for unit employees in the store during the meetings and all employees on the clock were required to attend. The Employer also posted at least ten notices containing their message that employees did not need the Union. Five higher managers conducted "ride alongs" with drivers;

almost every night, two to twelve ride alongs occurred. On ride alongs, a higher manager spoke directly with a driver on an individual basis, topics discussed included that Domino's already gave employees certain benefits; that the Union's chief executive officer went to jail; that employees did not need a Union; that they should make up their own minds and "you shouldn't just go for it because somebody tells you."

Further, after Radwon engaged in the conduct encompassed by Objection No. 28, i.e., attempts to undermine the Employer's antiunion stance, higher managers' immediately disavowed Radwon's support for the Union, indicating the Employer's opposition to the Union's campaign.

Taking into consideration the Employer's antiunion stance, employees would likely conclude that Assistant Manager Radwon was not speaking or acting on behalf of management when he engaged in the conduct at issue. Indeed, employee testimony shows that employees were aware that the Employer did not want employees to vote for the Union. Management testimony also confirms that employees present for certain conversations between the higher managers and Assistant Manager Radwon would know Radwon and management had a different position on the Union situation. Thus, I find that the Employer's extensive campaign against the Union and its higher managers' immediate specific disavowals of Radwon's support for the Union noted above, would mitigate the conduct at issue, i.e., his solicitations for two employees to sign cards, his telling an employee he should vote for the Union and his silence during an employee's conversation with former general manager Bablu. See e.g., *Terry Machine Co.*, 356 NLRB No. 120 (2011) (where an employer's extensive antiunion campaign along with explicit disavowals of area coordinators support for the union disavowed the area coordinators' widespread solicitation of employee signatures on a showing of interest petition and a second petition seeking commitments from employees to vote for the union); *Northeast Iowa Telephone Co.*, 346 NLRB 465 (2006) (where a general manager made clear to the employees that the union was not necessary, such antiunion stance mitigated a supervisor's statements that could have been viewed as prounion).

In these circumstances, while Radwon's prounion conduct in connection with the solicitation of union authorization cards, his telling an employee he should vote for the Union and his silence during the Bablu conversation satisfied the first prong of the *Harborside* analysis, I find that the evidence presented does not indicate that such coercive conduct materially affected the outcome of the election under the second prong of the *Harborside* analysis. Thus, I find there is insufficient evidence to establish objectionable conduct and I overrule the Employer's remaining objections.